IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 53 of 2000

in

SPECIAL CIVIL APPLICATIONNo 10548 of 1999

with

CIVIL APPLICATION NO. 1173 OF 2000

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LARSEN AND TOUBRO LIMITED

Versus

GUJARAT STATE PETROLEUM CORPORATION LIMITED

Appearance:

Mr. K.K. Venugopal, Sr. Counsel
With
Mr. S.N. Shelat, Sr. Counsel

Mr. Mihir H. Thakur, Ld. counsel
And SINGHI & BUCH ASSO. for Appellants

Mr. Mukul Rohtagi, Addl. Solicitor General
With
Ms. Ritu Bhalla
Mr. Saurabh Kirpal
Mr. Arvind Nayar
Mr. Jayesh Odera, Ld. counsels for Res.No. 1 & 2

Mr. C.S. Vaidyanathan, Sr. Counsel
With
Mr. B.J. Shelat, Sr. Counsel
Mr. G.N. Shah, Sr. Counsel
Mrs. Minoo Shah &
Mrs. Sonali Desai, Ld. counsels, for Res. No.3.

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE C.K.THAKKAR

Date of decision: 15/03/2000

CAV JUDGEMENT

Per: D.M. Dharmadhikari, C.J. :-

1. This Letters Patent Appeal was listed for admission, but we have heard all the parties at length for decision of the case finally, keeping in view the urgency of the subject matter, and the interim directions which were sought by the petitioner appellant.

2. This Letters Patent Appeal has been preferred under Clause 15 of the Letters Patent, against the order of learned Single Judge dated 7th February 2000, dismissing the Special Civil Application No. 10548 of 1999, preferred by the present appellant M/s. Larsen and Toubro Limited (hereinafter shortly referred as " L & T Ltd. "); seeking intervention and directions in the matter of award of contract to Respondent No.3 ABB Kraftwerke AG, ABB Power Generation Limited (hereinafter shortly referred as " ABB Ltd"), for setting up of 160 MW NATURAL GAS FIRED COMBINED CYCLE POWER PLANT AT HAZIRA, in the State of Gujarat. The two main contenders for the contract aforementioned are the appellant company L & T Ltd. and respondent no.3 ABB Ltd.

3. Learned Single Judge by the impugned order went

in great and minutest details of the technical and financial aspects of the contract in coming to a conclusion that, there has been no unfairness in the decision making process for selecting respondent No.3 ABB Ltd., for grant of contract by the Gujarat State Petroleum Corporation Limited, the Respondent No.1 (shortly referred hereinafter as " Corporation "). According to the Corporation, as far as possible complete objectivity was maintained in making selection in consultation with technical, financial and management experts on the selection board, which is demonstrated from the minutes of the meeting of the 4th Management Committee of the Directors of the Company held on 4th September 1999 in Udyog Bhavan, Gandhinagar. In the process of selecting a suitable contractor for the project, on various attributes and qualifications of the competing companies, marks were allotted, and on the basis of those marks final selection was made. The basic challenge on behalf of the petitioner L & t Ltd is about the evaluation procedure adopted in making the final selection. Learned Sr. Counsel Shri. Venugopal appearing on behalf of the appellant company L&T Ltd., limited his arguments to challenging the lower marks allotted to the appellant company and higher marks allotted to the respondent ABB Ltd., to deprive the petitioner company of the contract. The evaluation method and the allotment of marks on each head as per the laid down criteria have been given in a tabular chart as under:-

Criteria	Weightage	ABB	L & T
1. Per MW cost	75	75	71.469
2. Financial Package Offered	15	15	0.0
3. Equity offered	5	5	5
4. Quality of Proposal and Back Ground/Experience in respect of succesful completion of EPC Contracts in Power Sector.	5	5	4
Total:	100	100	80.469

4. For understanding above objective criteria adopted for making selection , a brief reference to the method of evaluation of the bids offered by the competing parties in response to the invitation for offer described as "REQUEST FOR PROPOSAL" (shortly mentioned by parties as "RFP") would be necessary. The main challenge on behalf of the appellant L&T Ltd is to the award of zero mark to it on the criteria of FINANCIAL PACKAGE OFFERED in comparison to full 15 marks awarded to ABB Ltd. The method of evaluation as indicated "RFP" Financial Package is as under:-

" GSPC require Contractor's plan (including strategy and approach) for securing Supplier's Credit support or any other form of Financial Assistance and commitment for the equipment and the terms and conditions of the same. Please document your response using the format of Exhibit PR-C."

5. The Financial Package offered by appellant L & T Ltd in the prescribed format PR-C was as under:-

FINANCIAL PACKAGE OFFERED BY APPELLANT L&T LTD

Document Contractor's organization plan to secure supplier's credit / any form ofFinancial assistance.

Source : Indian Bank

Quantum of Finance Offered : Upto 55 Crores

Repayment Profile

. Tenor : 7 years

. Installments : Quarterly

. Moratorium : Till Capitalisation

---Rate : 16.75 PTPM

Currency : INR

Details of Credit Enhancement

Requires. : As per Annexure I

Other terms & conditions, major covenants : The lease is applicable for financing the Heat Recovery Steam Generator and its accessories. An interest of 15.3% will be charged on all outstanding advances till the lease is capitalised. Taxes and duties will be borne by GSECL. Rest of the conditions are as per Annexure I.

The alternative Financial Package offered by the appellant was as under:-

Source : Indian Banks/FIs etc.

Quantum of Finance Offered : Upto 500 Crores comprising of Rupee term loan, Secured Redeemable Nonconvertible Debentures and Government Guaranteed Bonds

Repayment Profile

. Tenor 7 Years

. Installments Quarterly

. Moratorium 2 years

Rate : Weighted average coupon rate of 14.5 % (exclusive of interest tax) payable semi annually.

Currency : INR

Details of Credit Enhancement Required : As per Annexure I

Other terms & conditions, major covenants : As per Annexure I

6. The Selection Body called " Management Committee" consisting of technical, financial and management experts in its final decision taken, and contained in the minutes of the meeting of 4th September 1999 found the Financial Package offered by the appellant L & T Ltd., as non-responsive and awarded them zero mark. The relevant part of the minutes of the meeting of the management committee reads as under:-

" The specifics of the financing package offered by L&T and ABB were discussed in the light of foregoing. L&T's financing had a tenor of Seven years and ABB's average tenure was more than Ten years. The PPA allows for recovery of capital or principal payment of loans through depreciation, which was about 7.98 % per year. Any financing that had short tenure such as L&T's would tend to reduce the Return on Equity. Also, financing tenure of 7 years will cause low cash flow resulting in very low debt service coverage ratio which itself will render financing not feasible.

The indicative calculations, prepared in house on the basis of common assumptions, confirmed the foregoing and showed that L&T's offer of financing will result in an equity IRR of about 10.42 % and that of ABB in an equity IRR of 17.47 %.

Moreover, it had been laid down that where in the

opinion of GSPCL the financing package stipulates norms not in line with the prudent financial practices, such a financing package will be considered non responsive and no marks will be awarded under this category.

The committee deliberated the issue at length and in view of:

(i) Cash flow problems,
(ii) Poor Return on Equity,

in case of financing package of L&T, decided to allocate Zero marks to L&T's offer, ABB's financing package was given 15 marks. "

7. The contention advanced on behalf of the appellant L&T Ltd., is that, the Financial Package offered by them in the prescribed format was deliberately misconstrued by the selection committee only to favour the respondent No.3 ABB Ltd., with the award of contract. The appellant Company wrote letters to the Corporation questioning their evaluation method of Financial Package. In response thereto the Managing Director by their letters informed the appellant Company that the Financial Package offered by the appellant with tenor of 7 years was not practically feasible. The appellant company was also informed that 7 years tenor quoted by them in general parlance of financial market clearly intended to mean ' total duration of the loan ' that is Sum of Moratorium And Repayment Period. They were therefore informed that, interpretation of their offer made was based on the common understanding of the word "Tenor". On behalf of the appellants heavy reliance has been placed on the opinion of the Financial Consultants, Kishore And Shastry Consultants Pvt. Ltd. It is submitted that the financial consultants Kishore And Shastri were duly appointed by the Corporation for evaluating the financial packages. Disregarding their opinion in favour of the appellant company, an opinion was sought from other consultants Fieldstone Capital Services Pvt. Ltd. It is contended that, ignoring the opinion of Kishore And Shastri Consultants and seeking opinion of Fieldstone Capital Services Pvt.Ltd. was a deliberate act of favoritism for awarding contract to respondent ABB Ltd. Heavy reliance is also placed on a letter of the financial institution ICICI, which states that their financial package actually meant 7 years tenor for actual repayment and 2 years moratorium, that is total 9 years. The repayment was to be made in 28 quarterly installments. It is submitted that the

financial package of the appellant company has been deliberately misconstrued and the same is evident from the letter of ICICI written to the appellants financial company, namely L & T Finance Ltd. Copy of the letter of ICICI has been produced in the appeal for reliance.

8. Whether the final package proposed by the petitioner L & T Ltd was workable or not is a subject matter requiring expertise. It is not for this Court to go into the merits of the decision taken by the financial experts. The accusation made against the Corporation is that, by bye-passing and ignoring the opinion of Kishore And Sastri, who were duly appointed consultants on remuneration, a committed opinion was sought from M/s. Fieldstone Capital Services Pvt. Ltd. The answer on behalf of the Corporation is that, Kishore And Sastri in its opinion had not dealt with the evaluation methodology. The committee thought it prudent to take independent opinion on evaluation methodology from Fieldstone Capital Services Pvt. Ltd. In the opinion of this Court no malice can be inferred only because expert opinion on evaluation methodology was obtained from Fieldstone Capital Service Pvt. Ltd. It was upto the managing committee to take a decision to obtain one or two opinions. Before the committee there were the opinion of Kishore And Sastri on financial package and opinion of Fieldstone Capital Services Pvt. Ltd on evaluation methodologies. The two opinions together informed the Managing Committee the relevant grounds on which the final decision was to be taken. This court finds no merit in the allegation that the opinion of Fieldstone Capital Services Pvt. Ltd. was deliberately obtained to bye-pass the opinion of Kishore And Sastri only to favour ABB Ltd.

9. Challenge to award of full 15 marks to ABB Ltd.,
on Financial Package :-

On behalf of L & T Ltd, the contention advanced is that, there was no firm offer on financial package by ABB Ltd. The appellant submits that, Exhibit PR-C (the format in which the financial package was to be offered) submitted by ABB Ltd places a condition to the following effect:-

" The above terms and conditions are indicative.
They do not constitute any commitment for any ABB company or the above parties to arrange financing to the above terms and conditions "

9.1 It is submitted that, the above quoted condition mentioned by ABB Ltd was clearly with a view to get out of commitment,though it is expected from them under the RFP. It is argued that the offer of ABB Ltd was not an offer in eye of law. Such an offer should have been treated as non-responsive and given zero mark. Reference is made to the provisions of Contract Act to point out that:-

" An offer is an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed. Under the objective test of agreement, an apparent intention to be bound may suffice, i.e. the alleged offerer may be bound if his conduct is such as to induce a reasonable person to believe that he intends to be bound. "

In reply to the above contention, on behalf of ABB Ltd, it is submitted that under the RFP document what was expected from bidders was to give a plan or scheme for arranging finance. They were not expected to give any firm or definite offer in that behalf. It is submitted that the proposal or plan submitted by ABB cannot be said to be non responsive merely because it bluntly said that the terms & conditions are only indicative and the decision would depend upon the ultimate terms & conditions proposed by the creditor or the financier.

9.2 It is submitted on behalf of the ABB Ltd that, what ABB Ltd said bluntly, the appellant L & T Ltd has said mildly in its financial package, by stating that :-

" The lenders would appraise the project and perform due diligence on the final terms and documents on award of the EPC Contract to Larsen & Toubro and on their satisfaction the loan will be disbursed. "

9.3 On behalf of appellant L & T Ltd., learned counsel argued that the difference between two financial packages are that in case of ABB Ltd there is no commitment from the tenderer in respect of quantum, rates, tenor etc., while in case of L & T Ltd there is the firm commitment from tenderer, that is L & T Ltd as to quantum, rates, tenor etc.

9.4 As we have understood, the bidders were required

to give only a plan or a scheme for arranging finance as part of financial package. It could not be termed to be in the nature of an offer which on its acceptance would have become a binding contract. Naturally the tenderer had offered a financial package to which the lender or the financier was not a party. The terms & conditions were left to be finalised with the financier or the creditor after the package is accepted. For our purposes the Managing Committee of the Corporation did not consider any of the financial packages offered by appellant or the respondent Company to be not firm and we have no reason for want of financial expertise in us to take a contrary view with regard to one or the other financial package. We cannot hold that the financial package offered by ABB Ltd. should have been rejected on the sole ground that it was not firm. We have already indicted above the justification for awarding zero mark to L & T Ltd on its financial package. As has been mentioned above, the managing committee found that the financial package with the tenor and moratorium period given by L & T Ltd was impractical. In this regard learned counsel for the appellant L & T submitted that the fairness demanded that the committee ought to have sought clarification from L & T company if there was some doubt with regard to its financial package.

9.5 The reply given on behalf of the Corporation on the grievance of not seeking clarification on financial package and other technical aspects of the offer made by L & T, is that, clarification could not have been sought from bidders after price bid opening as per I C B Rules. This reply is in conformity with the opinion of the Consulting Engineers Desein Pvt. Ltd., which has given similar opinion in its letter dated 30th August 1999 sent to the Corporation. As a matter of fact, consultation and seeking of clarifications from bidders after price bid and its opening would have led to grievances from other bidders on accusation that negotiations contrary to the terms of RFP were held. Such procedure in fact would have brought in some unfairness in decision making process. In our opinion the committee cannot be held to have in any manner unfairly acted in not seeking any clarification from the bidders after the price bid opening. Such procedure if adopted would have exposed the committee to the charge of deviating from the laid down procedure as per the RFP norms.

9.6 Our conclusion, therefore, is that, the decision of the Managing Committee to evaluate the financial package of the bidders in consultation with financial experts to award full 15 marks to ABB Ltd and no mark to

L&T Ltd cannot be faulted.

10. Techno-Commercial Evaluation (Per MW cost) :

(Award of 75 marks to ABB and 71.469 marks to L&T)

In regard to awarding less mark to appellant L & T and higher mark to ABB, the Managing committee have recorded in its meeting its decision as under:-

" (vi) The evaluated per MW cost, was arrived at by loading quoted cost by missing items, mentioned above and considering offered output with 9 lac cubic meters / day gas and derated by 2 % to account for deterioration of SHR as per criteria already laid down. This was further loaded with differential "auxiliary power" and "heat rate" loading. The technical evaluation has awarded maximum 75 marks to the "lowest evaluated per MW cost" bid. Other bids are marked in inverse proportion of their "evaluated per MW cost". Thus, ABB gets 75 marks, L& T-Sumitomo & BSES-BHEL-Ansaldo get 73.86 and 62.26 marks respectively as shown in Recommendation report of M/s. Desein. This report was found to be in order and hence committee decided to accept it.

RFP had required that in case of manufacturer being a licensee, the licensee should submit a back up guarantee from original manufacturer licensor in respect of performance guarantees and supply of spares. A format was also furnished to bidders. Hitachi had stated that for frame 6FA they are co-developers of GE. Subsequent GE clarification letter furnished by Hitachi states that gas turbine(s) will be built pursuant to existing license or manufacturing associate agreement. Under the agreement, Hitachi is granted the right to manufacture entire gas turbine. The letter further states that GE provides Hitachi with technical information on numerous gas turbine models as well as technical support during manufacture, if required, including visits by GEPS engineering an technical specialists to Hitachi Ltd's factories. The aforesaid GE letter makes it clear that Hitachi is indeed a licensee of GE. And GE's back-up guarantees come with posting of supervisory

specialists at manufacturer's works at cost and may involve some other costs. Desein has estimated cost of such effort at the level of US $ 2 to 3 million although they have not considered the same in evaluation. The Committee deliberated on the issue and decided to load L & T offer further by US $ 2 million. Similarly in case of BSES also the arrangement offered is not satisfactory as brought out in para 4.10 of Desein's Report. Hence Committee decided to load BSES bid also by the same amount of US $ 2 Million.

The following resolution was passed.

" RESOLVED THAT the recommendations as submitted by M/s. Desein in their report titled "Technical bid recommendations against 'Request for Proposal' for selection of EPC contractor" be and is hereby accepted and approved ".

"RESOLVED FURTHER THAT M/S. BSES AND L&T's BID BE FURTHER LOADED BY US $ 2 MILLION AND M/s ABB be given full 75 marks out of possible 75 marks on account of their evaluated EPC price per MW being the lowest and M/s. L&T as well as M/s BSES be given marks in inverse proposition. "

10.1 Criticising the decision of the Managing Committee quoted above, on behalf of appellant L&T it is contended that, with a view to award contract to ABB, the Corporation not only loaded the appellant EPC price but also discriminatingly did not reduce the capacity offered by 2 %. It is also submitted that the appellant L&T price was arbitrarily loaded for sales tax at Rs.5.5 crores, With holding tax Rs. 1.68 crores, Works contract tax Rs. 0.5389 crores and Loading for non furnishing of back up guarantee, 2 million U.S. $. The appellant's price due to the above loading was valued at Rs.2.8020 crores, while that of the respondent ABB was valued at Rs.2.7596 crores. It was not reduced maximum capacity offered by ABB by 2 % as required by RFP document and subsequent clarification. This has resulted in not being awarded 75 marks which it was legitimately entitled, while it was awarded full 75 marks to ABB.

10.2 The justification offered by the Corporation is based on the interpretation of letter of 3rd April 1999. That the condition of 2 % deduction in the maximum capacity offerable was applicable only to those who

utilise 9 lacs m3 of gas per day. The contention advanced is that the justification sought to be offered not to reduce 2 % from the maximum capacity offered by ABB is contrary to the language of the letter dated 3rd April 1999 and RFP requirement. It is submitted that this was deviation from laid down criteria and undue favour to the ABB.

10.3 We can not go into the niceties of Techno Commercial Evaluation which was basically a subject of the technical experts. We find that the decision was taken after obtaining opinion independently of technical and financial experts, including the technical experts who were members of the Managing Committee. It is neither possible nor desirable for this Court to go into the correctness of the decision with regard to Techno-Commercial Evaluation as this Court is ill-equipped to enter into that subject. As this Court can understand, per MW cost worked out in case of L & T had to be further loaded towards various account of taxes mentioned above. This Court cannot therefore find any error in the decision in awarding 71.469 marks to L & T and full 75 marks to ABB.

10.4 We seek support in refusing interference in the decision of the Committee based on the recommendation of technical experts, from the observations of Supreme Court in FERTILIZER CORPORATION KAMGAR UNION V. UNION OF INDIA, AIR 1981 SC 344, which reads as under:-

" Certainly, it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, is it a function of the judges in our constitutional scheme. We do not think that our internal management, business activity or institutional operation of public bodies can be subjected to inspection by the court. To do so, is incompetent and improper and, therefore, out of bounds, nevertheless, the broad parameters of fairness in administration, bona fides in action, and the fundamental rules of reasonable management of public business, if breached, will become justiciable. "

11. Quality of Proposal and Background/ Experience in respect of successful completion of EPC Contracts in Power Sector:

(5 marks to ABB and 4 marks to L & T Ltd)

On behalf of appellant L & T it was submitted that there was no justification to award one mark less to L & T on the above criteria as against full marks to ABB. The relevant part of the decision of the Managing Committee contained in its minutes read as under:-

" (iv) The RFP required that a GT manufacturer be a part of biding consortium. In respect of L&T bid, consortium comprise of L&T and Sumitomo and Sumitomo represents Hitachi in the consortium. the arrangement does not exactly fulfil the RFP criteria in respect of consortium arrangement. The committee deliberated this issue and decided that one mark be deducted in case of L&T on above account. Consequently ABB, L&T and BSES get awarded 5, 4 and 5 marks respectively. "

11.1 The objective to giving of one mark less to L&T, on its behalf it is submitted that among the bidders ABB were manufacturers of Gas Turbines (GT). The other bidders like L&T, BSES were not the manufacturers, but they had a consortium with Sumitomo and Sumitomo had a consortium with Hitachi and Gujarat State Enegy Generation Limited (Respondent No.2). The condition of a back up guarantee from the manufacturers was not initially a condition in the RFP. It was introduced as a condition subsequently vide letter dated 15-3-1999, and this was done only to favour ABB which alone was among the bidders manufacturer and required no back up guarantee. The above arguments advanced has been replied on behalf of the Corporation stating that, where the bidder itself is not the manufacturer insistence of back up guarantee from the manufacturer was necessary in the event of technical deviation or break-downs. According to the Corporation, past experience had been that in absence of back up guarantee from the manufacturer several working problems arose in running of the plant.

11.2 It is not open for this Court to question the insistence on consortium and back up guarantee in cases where the bidder itself is not the manufacturer. We find no ground to infer any mala fide on the basis that the Corporation insisted on a back-up guarantee from the manufacturers. The decision whether the consortium conformed to the RFP requirement was also a matter for the technical and financial experts to decide. As per the decision recorded in the minutes of the Managing Committee, Somitomo and Hitachi were not directly a party

to the consortium of appellant L&T. It was therefore open to the Managing Committee to deduct one mark from the weightage to L&T on the criteria of 'Quality of Proposal and background/ experience' as mentioned above.

12. GROUND URGED ON PUBLIC INTEREST :-

According to the appellant L&T, appellant's offer was with generating capacity of 189.87 MW against the generating capacity of respondent no.3's plant of 156.1 MW. There was clear difference in the output between the two plants. The appellant L&T's plant would generate approximately 33.77 MW of additional power which would be available to the State. It is submitted that when 33.77 MW more power are available to the State, there was no justification to select a plant having power generation capacity of 156.1 MW, when 9 lac M3 power per day of gas is available . Appellant submitted that, generation of additional power would have generated additional revenue to the tune of approximately 62.5 cores.

12.1 The RFP issued was to invite tenders for generating electricity in the capacity of 160 MW + - 10%. The said decision was taken in purusance of policy decision taken by the State Government as early as on December 1, 1998 even before inviting tenders by the Corporation. The answer of the Corporation appears to be acceptable that, merely because, as claimed on behalf of the appellant L&T, it would have generated 189.87 MW from its plant, the same could not have been the sole consideration to select it for awarding contract, because additional generation of electricity would have also correspondingly increased the cost, other requirements towards infrastructure etc. for which no offers were called . The argument on this aspect advanced on behalf of the appellant L&T requires going into the justification of the tender condition contained in RFP. In taking a decision to peg up generating capacity to 160 MW + - 10 % was a decision taken by the Corporation in consultation with the Government and other technical and financial experts with an intention to set up a plant for generating electricity for the State. Whether the public interest was advanced or harmed cannot be judged only on the higher generating capacity of the plant offered by the appellant without giving regard to other factors and considerations, such as cost, profit, tariff, taxes and other requirements of the State. This Court finds no ground to come to a conclusion that any public interest was harmed in not selecting the appellant L&T in awarding the contract and in finding respondent ABB to be a superior tenderer.

12.2 I the course of arguments, learned counsel Shri. Venugopal assisted by Shri. Mihir Thakore in their address on behalf of appellant L&T harped on one theme that, there was total lack of transparency in the evaluation process and this smacks of favouritism and procedural impropriety. It was argued that, after opening the technical commercial and price bids of all the parties, on 19-8-1999 clarifications could have sought from appellant L&T on the issue, if the respondent Corporation had doubts about the bids submitted by L&T. It is submitted that unwarranted assessments were made against the bid of the appellant. We have already held above that post bid negotiations would have raised grievance and doubts about the fairness of the prcedure adopted by the Corporation. On behalf of the respondents, reference was made to a Circular dated 18-11-1998 by the Central Vigilance Commissioner saying that post bid negotiations should not be made. After the bids were submitted and after their opening the respondents can not be accused of acting in any manner unfair to any of the bidders in not making post bid consultations or negotiations. It acted as it was expected to act. The other allegations with regard to delay in replying to the letters sent by appellant L&T and not returning their Bank Guarantee also do not indicate that there was any secrecy maintained in the decision making process. Allegations of mala fide against a body consisting of technical, financial and management experts so easily made are difficult of acceptance, unless this Court finds grounds and circumstances strong enough on record to infer a collusion or conspiracy between all of them for an ulterior purpose of favouring a particular party. The evaluation methodology to certain extent was indicated in RFP. The consultant Kishore And Sastri Consultants (P) Ltd, who are appointed consultants had given their opinion. Opinion was also sought from Fieldstone Capital Services Pvt. Ltd. on evaluation methodology for a more and better objective assessment. Thus an attempt was made by the Committee to be as far as possible objective in assessing the offers of the bidding parties. In our considered opinion, the accusation of arbitrariness or mala fide has no firm foundation. No grounds are made out to justify nullification of the decision of a body consisting of large number of individuals representing different fields of specialisation on the subject.

12.3 It is settled principle of law that approach for judicial review is not an appeal against the administrative decision which is made here in

consultation with experts. Judicial review is permissible only against decision making process and not decision itself. This Court finds itself totally ill-equipped for want of knowledge of technical and financial intricacies in the matter of award of contract for setting up power plant, to come to a conclusion either way that the decision taken by the Managing Committee was erroneous or correct. We also do not find it to be against public interest. It is possible to project an opposite view on the financial and technical opinions formed by the experts and consequent decision taken by the Committee. But that can be no justification to upset their decision, as this Court finds the decision to have been taken objectively and bona fide. We have tried to understand the technical and financial information given to us by the parties before us, and we have tried to scrutinise the record. So far as we have understood, it is not possible for this Court with limited knowledge on the subject to come to a conclusion that the decision taken was either actuated by favouritism or was in utter disregard of public interest. We also find no force in the bald allegation that the RFP was tailor-made to suit selection of ABB Ltd.

13. In refusing to interfere after due consideration of the aspects brought before us, we are guided by the observations of the Supreme Court in the case of AIR INDIA LTD. VS. COCHIN INTERNATIONAL AIRPORT LTD, J.T. 2000 (1) SC 481, which read as under :-

" The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision consideration which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily.

The state, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not

merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene. "

14. In RAUNAQ INTERNATIONAL LTD VS. I.V.R. CONSTRUCTION LTD. AND OTHERS, it is observed as under:-

" A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. Price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work - which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee. "

In the said case the Court has also given a caution against Court's intervention, by observing thus :-

" By court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Hence in granting an injunction or stay order against the award of a contract by the Government or a government agency, the court has to satisfy itself that the public interest in holding up the project for outweighs the public interest in carrying it out within a reasonable

time. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost.Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene. "

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" Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene. "

15. After reviewing the entire case law on the subject the principles deduced in TATA CELLULAR VS. UNION OF INDIA (1994) Vl. VI, SCC 651, by the Supreme Court, for exercising judicial restraint in administrative action are:-

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such

decision are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. "

16. On examining the material brought before us, the decision of the Corporation to award the contract to the respondent ABB Ltd, cannot be held to be unfair or against public interest. Consequently we dismiss this appeal and maintain the order of learned Single Judge passed in Special Civil Application No.10548 of 1999, but in the circumstances, without any order as to costs.

17. No order on civil application.

(D.M. Dharmadhikari, C.J.)

(C.K. Thakkar, J)

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